

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

8 \* \* \*

9 ROBERT "SONNY" WOOD, an individual;  
10 ACCESS MEDICAL, LLC, a Delaware  
limited liability company,

11 Plaintiffs,

12 v.

13 NAUTILUS INSURANCE GROUP, a  
Delaware limited liability company, *et al.*,

14 Defendant.

Case No. 2:17-cv-02393-MMD-CWH

ORDER

(Def.'s Motion to Dismiss – ECF No. 8,  
Def.'s Motion to Strike – ECF No. 11, Pls.'  
Motion to Remand – ECF No. 18)

15  
16 **I. SUMMARY**

17 Before the Court are three motions: Plaintiffs Robert "Sonny" Wood and Access  
18 Medical, LLC's (together, "Insureds") motion to remand (ECF No. 18); Defendant Nautilus  
19 Insurance Group's ("Nautilus") motion to dismiss (ECF No. 8); and Nautilus's motion to  
20 strike (ECF No. 11). The Court has reviewed the parties' responses and replies (ECF Nos.  
21 19, 20, 26, 27, 29, 35). For the reasons discussed below, the Insureds' motion to remand  
22 is denied, Nautilus's motion to dismiss is granted in part and denied in part, and Nautilus's  
23 motion to strike is denied as moot.

24 **II. BACKGROUND**

25 This action is intertwined with two other actions, one filed in California state court  
26 in 2011 ("Switzer Action") and the other filed in this Court in 2014 ("Coverage Action"). In  
27 the Switzer Action, a non-party named Ted Switzer alleged four claims for interference  
28 with prospective economic advantage against the Insureds. In the Coverage Action,

1 Nautilus obtained a declaration that it was not required to defend or indemnify the Insureds  
2 in the Switzer Action. In the current action, the Insureds primarily contend that Nautilus  
3 was required to defend and indemnify them in the Switzer Action after all.

4 The Switzer Action arose from a soured business relationship formed between  
5 Plaintiff Wood and a non-party, Ted Switzer. (See ECF No. 13-1 at 3.) Wood and Switzer  
6 founded Flournoy Management, LLC (“Flournoy”) to market and sell medical implants.<sup>1</sup>  
7 (*Id.*) When the relationship deteriorated, Switzer initiated the Switzer Action against Wood  
8 and Flournoy to compel access to Flournoy’s books and records. (ECF No. 1-1 at 9-10.)  
9 In the course of the Switzer Action, Switzer filed a cross-complaint asserting *inter alia* four  
10 claims for interference with prospective economic advantage against the Insureds. (See  
11 ECF No. 13-1 at 3, 7.)

12 Nautilus initiated the Coverage Action after the Insureds requested that Nautilus  
13 defend them in the Switzer Action. (ECF No. 1-1 at 12-13.) Nautilus sought a declaration  
14 in the Coverage Action that it did not owe a duty to defend or indemnify the Insureds. (*Id.*  
15 at 13.) The Insureds argued that Nautilus owed a duty to defend and indemnify because  
16 Switzer might advance a defamation claim based on certain factual allegations in his  
17 cross-complaint. (ECF No. 13-1 at 7.) (The insurance policy essentially required Nautilus  
18 to defend the Insureds against defamation claims.<sup>2</sup>) Nautilus argued that the factual  
19 allegations in the cross-complaint, coupled with the lack of any live defamation claims,  
20 were insufficient to trigger its duty to defend and indemnify. (See *id.*) The Court agreed  
21 with Nautilus and declared that it did not owe a duty to defend or indemnify. (*Id.* at 12.)

22 ///

23 ///

---

24 <sup>1</sup>Plaintiff Access Medical (“Access”) conducted the same kind of business as  
25 Flournoy. (ECF No. 1-1 at 9.) Flournoy expected to receive certain profits from Access as  
well as profits from other companies that were owned by Switzer. (*Id.*)

26 <sup>2</sup>The Insureds’ policy with Nautilus required Nautilus to defend and indemnify the  
27 Insureds for “personal and advertising injuries” resulting from claims relating to the “oral  
28 or written publication, in any manner, of material that slanders or libels a person or  
organization or disparages a person’s or organization’s goods, products, or services.”  
(ECF No. 13-1 at 3.)

1 Despite that judgment, the Insureds filed suit against Nautilus alleging five claims  
2 that are now pending before this Court: (1) declaratory relief (in the form of declarations  
3 that Nautilus owed a duty to defend and indemnify in the Switzer Action and that Nautilus  
4 was required to pay in full for the Insureds' independent counsel); (2) breach of contract;  
5 (3) breach of implied covenants; (4) promissory estoppel; and (5) violation of various  
6 provisions of NRS § 686A.310, which prohibits insurers from engaging in certain unfair  
7 claims settlement practices. (ECF No. 1-1.) Although the Insureds initially filed the lawsuit  
8 in Nevada state court, Nautilus removed to this Court. (ECF No. 1.)

### 9 **III. MOTION TO REMAND (ECF No. 18)**

#### 10 **A. Legal Standard**

11 Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction  
12 only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl.  
13 1; *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A suit  
14 filed in state court may be removed to federal court if the federal court would have had  
15 original jurisdiction over the suit. 28 U.S.C. § 1441(a). However, courts strictly construe  
16 the removal statute against removal jurisdiction, and “[f]ederal jurisdiction must be rejected  
17 if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980  
18 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing  
19 federal jurisdiction. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988).

20 To establish subject matter jurisdiction pursuant to diversity of citizenship, the party  
21 asserting jurisdiction must show: (1) complete diversity of citizenship among opposing  
22 parties and (2) an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332(a). Where  
23 it is not facially evident from the complaint that \$75,000 was in controversy at the time of  
24 removal, a defendant seeking removal must prove, by a preponderance of the evidence,  
25 that the amount in controversy requirement is met. *Valdez v. Allstate Ins. Co.*, 372 F.3d  
26 1115, 1117 (9th Cir. 2004).

27 Under a preponderance standard, a removing defendant must “provide evidence  
28 establishing that it is ‘more likely than not’ that the amount in controversy exceeds” the

jurisdictional minimum. *Id.* at 1117 (quoting *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)). As to the kind of evidence that may be considered, the Ninth Circuit has adopted the “practice of considering facts presented in the removal petition as well as any ‘summary-judgment-type evidence relevant to the amount in controversy at the time of removal.’” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)). Conclusory allegations are insufficient. *Id.*

## **B. Discussion**

### **1. Diversity of Citizenship**

Insureds first argue that removal is improper because Nautilus’s petition for removal fails to allege the citizenship of the owners of Access. (ECF No. 18 at 3.) “[A]n LLC is a citizen of every state of which its owners/members are citizens.” *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). Thus, Insureds contend that Nautilus “is required to prove that every owner and member of Access is a citizen of a different state than Nautilus.” (ECF No. 18 at 4.)

In its petition for removal, Nautilus alleged that Wood is a citizen of Nevada and that Access is a Delaware company with its principal place of business in Nevada. (ECF No. 1 at 3.) Nautilus also alleged its own citizenship in Arizona. (*Id.*) While Nautilus did not expressly enumerate every owner and member of Access and identify their citizenship, it had good reason—Wood testified under oath that “he is, and always has been, the sole member of Access.” (ECF No. 29 at 12 (citing ECF No. 32-5 at 5-7).) Insureds do not dispute this fact. (See ECF No. 35.) Accordingly, the Court finds that Nautilus has demonstrated complete diversity.

### **2. Amount in Controversy**

Insureds additionally argue that removal is improper because Nautilus did not set forth any evidence that the amount in controversy exceeds \$75,000 in its petition for removal. (ECF No. 18 at 3.) It is not evident from the face of the underlying Complaint that Insureds seek more than \$75,000 in damages. (See ECF No. 1-1 at 24.) However, the

1 Insureds clarify in their reply that they only seek damages related to Nautilus's failure to  
2 defend, allowing the Court to exclude indemnification for damages awarded in the Switzer  
3 Action. (ECF No. 35 at 3 (citing ECF No. 1-1 at 24).)

4 Nautilus's strongest argument is that the defense costs sought by Insureds exceed  
5 \$75,000. (ECF No. 29 at 9.) While Nautilus provides a number of declarations attesting to  
6 various costs, the Court cannot consider those declarations because they constitute  
7 inadmissible hearsay. *Matheson*, 319 F.3d at 1090 (noting that the Ninth Circuit has  
8 "endorsed the Fifth Circuit's practice of considering . . . summary-judgment-type  
9 evidence relevant to the amount in controversy at the time of removal" (internal quotation  
10 marks omitted)); see also *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial  
11 court can only consider admissible evidence in ruling on a motion for summary  
12 judgment."). Nevertheless, given the extent of litigation that has taken place, it is more  
13 likely than not that the defense costs for which Insureds seek damages exceed \$75,000.  
14 Using even conservative estimates, the cost of preparing for and defending in a twenty-  
15 five-day jury trial easily surpasses \$75,000. Accordingly, the Court finds that Nautilus has  
16 sufficiently alleged amount in controversy for purposes of diversity jurisdiction.

#### 17 **IV. MOTION TO DISMISS (ECF No. 8)**

##### 18 **A. Legal Standard**

19 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which  
20 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide  
21 "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.  
22 R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8  
23 does not require detailed factual allegations, it demands more than "labels and  
24 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*  
25 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual allegations  
26 must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S.  
27 at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
28 matter to "state a claim to relief that is plausible on its face." *Id.* at 570.

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
2 apply when considering motions to dismiss. First, a district court must accept as true all  
3 well-pleaded factual allegations—but not legal conclusions—in the complaint. *Id.* at 678.  
4 Mere recitals of the elements of a cause of action, supported only by conclusory  
5 statements, do not suffice. *Id.* Second, a district court must consider whether the factual  
6 allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially  
7 plausible when the plaintiff's complaint alleges facts that allow a court to draw a  
8 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.  
9 Where the complaint does not permit the court to infer more than the mere possibility of  
10 misconduct, the complaint has alleged—but has not shown—that the pleader is entitled to  
11 relief. *Id.* at 679. When the claims in a complaint have not crossed the line from  
12 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

13 The Court will consider court records and other documentation from the Switzer  
14 Action and Coverage Action in evaluating Nautilus's motion to dismiss without converting  
15 it into a motion for summary judgment since both actions are matters of public record. *Lee*  
16 *v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001) (citing Fed. R. Evid. 201).

## 17 **B. Discussion**

18 Nautilus contends that the Insureds' claims are barred by issue preclusion and  
19 claim preclusion. (ECF No. 8 at 11-13.) Alternatively, Nautilus argues, the Insureds have  
20 failed to state claims. (*Id.* at 15-21.) The Court finds that the Insureds' first three claims  
21 (declaratory relief, breach of contract, and breach of implied covenants) are barred by  
22 issue preclusion. The Court also finds that the Insureds have failed to state a claim for  
23 violation of NRS § 686A.310. However, the Court finds that the Insureds successfully state  
24 a claim for promissory estoppel that is not barred by either issue or claim preclusion based  
25 on the judgment in the Coverage Action.

### 26 **1. Issue Preclusion**

27 "The doctrine of issue preclusion prevents relitigation of all 'issues of fact or law  
28 that were actually litigated and necessarily decided' in a prior proceeding." *Robi v. Five*

1 *Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (quoting *Segal v. Am. Tel. & Tel. Co.*, 606  
2 F.2d 842, 845 (9th Cir. 1979)). “In both the offensive and defensive use situations the party  
3 against whom estoppel [issue preclusion] is asserted has litigated and lost in an earlier  
4 action.” *Id.* (alteration in original) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322,  
5 329 (1979)). “The issue must have been ‘actually decided’ after a ‘full and fair opportunity’  
6 for litigation.” *Id.* (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice &*  
7 *Procedure: Jurisdiction* § 4416, at 138 (1981)). “A party invoking issue preclusion must  
8 show: 1) the issue at stake is identical to an issue raised in the prior litigation; 2) the issue  
9 was actually litigated in the prior litigation; and 3) the determination of the issue in the prior  
10 litigation must have been a critical and necessary part of the judgment in the earlier  
11 action.”<sup>3</sup> *Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003).

12 The Insureds’ first three claims are predicated on resolution of a single issue—  
13 whether Nautilus owes a duty to defend based on the terms of the insurance policy. The  
14 Insureds’ first claim is for a declaratory judgment that “Nautilus is required to pay in full for  
15 the Insureds’ independent counsel due to the existence of an actual controversy.”<sup>4</sup> (ECF  
16 No. 1-1 at 17-18.) The Insureds allege that an actual controversy exists because Nautilus  
17 owes a duty to defend in the Switzer Action based on the terms of the insurance policy.  
18 (See *id.* at 17.) The Insureds’ second claim is for breach of contract, which is also  
19 predicated on a finding that Nautilus has a duty to defend based on the terms of the  
20 insurance policy. (*Id.* at 18.) The Insureds’ third claim is for breach of implied covenants  
21 of good faith and fair dealing. (*Id.* at 19.) This claim also turns on whether Nautilus owes  
22 a duty to defend based on the terms of the insurance policy: if Nautilus does not owe a  
23 ///

---

24  
25 <sup>3</sup>The preclusive effect of a federal-court judgment (such as the prior judgment at  
26 issue here) is determined by federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891  
(2008).

27 <sup>4</sup>The Court construes the first claim as a request for declaratory relief based solely  
28 on the terms of the insurance contract. Although the Insureds’ first claim contains  
allegations related to their promissory estoppel theory, the Insureds pleaded promissory  
estoppel as a separate claim for which declaratory relief can be granted.

1 duty to defend, then its refusal to defend could not have breached the implied covenants  
2 of the insurance policy.

3 Having defined one of the issues presently before the Court as whether Nautilus  
4 owes a duty to defend based on the terms of the insurance policy, the Court next considers  
5 four factors in evaluating the first element of the claim preclusion inquiry—whether this  
6 issue is identical to the issue raised in the Coverage Action:

- 7 (1) is there a substantial overlap between the evidence or argument to be  
advanced in the second proceeding and that advanced in the first?
- 8 (2) does the new evidence or argument involve the application of the same  
rule of law as that involved in the prior proceeding?
- 9 (3) could pretrial preparation and discovery related to the matter presented  
in the first action reasonably be expected to have embraced the matter  
10 sought to be presented in the second?
- 11 (4) how closely related are the claims involved in the two proceedings?

12 *Resolution Tr. Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999).

13 The first factor of the first element is satisfied because the evidence and arguments  
14 substantially overlap. Beginning with evidence, the Insureds relied on two allegations in  
15 the Coverage Action: Switzer’s cross-claims and an allegedly defamatory e-mail sent by  
16 a representative of Access (“Weide E-mail”). (ECF No. 13-1 at 7.) The Weide E-mail stated  
17 that the “[d]istributor in the California area is now banned from selling Alphatec products.”  
18 (ECF No. 1-1 at 12.) Here, the Insureds again rely on those two pieces of evidence (*id.* at  
19 11-12), introducing only two additional pieces of evidence (*id.* at 16). The first additional  
20 piece of evidence the Insureds offer is a statement made by Switzer during his  
21 deposition—Switzer “indicated that he might have been terminated from selling Alphatec  
22 products.” (ECF No. 1-1 at 16.) The Insureds suggest that this statement could ground a  
23 defamation claim by Switzer since the Weide E-mail stated that Switzer was in fact banned  
24 from selling Alphatec products. (*Id.*) The second additional piece of evidence the Insureds  
25 offer is a statement made by an individual named Dixie Switzer during her deposition that  
26 “contrary to Mr. Wood’s representations, Mr. Switzer never informed a third party that he  
27 wanted to terminate their business relationship.” (*Id.*) Presumably the Insureds intend to  
28 argue that this could also ground a defamation claim by Switzer (potentially triggering



1 Nautilus's duty to defend). Given that the Insureds pleaded half of the allegations upon  
2 which they rely in the Coverage Action, the evidence to be advanced in this proceeding  
3 substantially overlaps the evidence advanced in the Coverage Action. Moreover, the value  
4 of the additional factual allegations is dubious. Switzer's statement that he might have  
5 been terminated from selling Alphatec products could confirm that the Weide E-mail was  
6 true, undercutting the Insureds' contention that Switzer has an inchoate defamation claim  
7 at his disposal. Regarding Dixie Switzer's statement, the Insureds have failed to explain  
8 how it could ground a defamation claim.

9 Turning to the arguments, those also substantially overlap. The Insureds' claims for  
10 declaratory relief, breach of contract, and breach of implied covenants are predicated on  
11 arguments that Nautilus owes a duty to defend. The Insureds already advanced those  
12 arguments in the Coverage Action. (ECF No. 13-1 at 7.) The Insureds would likely attempt  
13 to advance new arguments based on the additional facts they have alleged, but the  
14 Insureds have failed to explain how the arguments they make in this action would differ  
15 from the arguments they made in the Coverage Action. (See ECF No. 20 at 7-9.)

16 The second factor in determining whether the issues are identical is satisfied  
17 because the two additional pieces of evidence the Insureds offer involve application of the  
18 same "rule of law" as that involved in the prior action. In the prior proceeding, the Court  
19 applied the terms of the insurance policy to the Insureds' factual allegations regarding  
20 Switzer's cross-complaint and the Weide E-mail to determine that Nautilus owed no duty  
21 to defend. (ECF No. 13-1 at 9-12.) Here, the Court would again apply the terms of the  
22 insurance policy to those factual allegations (and two additional factual allegations) to  
23 determine whether Nautilus owes a duty to defend. The same "rule of law"—here, the  
24 terms of the insurance policy—applies in both instances.

25 The third factor is satisfied because discovery in the Coverage Action could have  
26 uncovered the factual allegations the Insureds seek to present here. The Insureds had  
27 ample opportunity to conduct depositions of the Switzers in the Coverage Action but  
28 apparently elected not to do so. (ECF No. 13-1 at 6 ("Defendants . . . do not explain why

1 they could not have deposed these defendants in connection with this lawsuit, and  
2 discovery closed well before Nautilus filed its summary-judgment motion.”.)

3 The fourth factor is satisfied because the Insureds’ claims for declaratory relief,  
4 breach of contract, and breach of implied covenants are essentially the same as the claim  
5 decided in the Coverage Action. There, Nautilus sought a declaration that it did not owe a  
6 duty to defend, and here the Insureds seek a judgment that Nautilus does owe a duty to  
7 defend.

8 Nautilus has also shown that the other two elements of issue preclusion—that the  
9 issue was actually litigated in the prior action and that the determination of the issue in the  
10 prior action must have been a critical and necessary part of the judgment—are satisfied.  
11 Regarding the first of these remaining elements, the issue of whether Nautilus owed a  
12 duty to defend was actually litigated in the Coverage Action and decided on a motion for  
13 summary judgment. (ECF No. 13-1 at 12.) Regarding the last remaining element, the  
14 determination of the issue was a critical and necessary part of the judgment because it  
15 was the primary issue pending before the Court. (*See id.* at 2.)

16 Accordingly, the prior judgment in the Coverage Action has preclusive effect on the  
17 first three claims the Insureds advance.<sup>5</sup>

## 18 **2. Claim Preclusion**

19 Having found that the Insureds’ claims for declaratory relief, breach of contract, and  
20 breach of implied covenants are barred by the doctrine of issue preclusion, the Court next  
21 considers whether the Insureds remaining claims for promissory estoppel and violation of  
22 NRS § 686A.310 are barred by claim preclusion.<sup>6</sup> “Claim preclusion ‘treats a judgment,  
23 once rendered, as the full measure of relief to be accorded between the same parties on  
24

---

25 <sup>5</sup>Nautilus has failed to show that the Insureds’ remaining claims for promissory  
26 estoppel and violation of NRS § 686A.310 are barred by issue preclusion. Nautilus does  
27 not argue that the Insureds even hinted at a theory of promissory estoppel in the Coverage  
28 Action, and the issue of whether Nautilus owed a duty to defend is unrelated to whether it  
violated NRS § 686A.310.

<sup>6</sup>Nautilus contends that these claims are barred by claim preclusion. (ECF No. 8 at  
11-13.)

1 the same claim or cause of action.” *Robi*, 838 F.2d at 321 (quoting *Kaspar Wire Works,*  
2 *Inc. v. Leco Eng’g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978)). “Claim preclusion  
3 ‘prevents litigation of all grounds for, or defenses to, recovery that were previously  
4 available to the parties, regardless of whether they were asserted or determined in the  
5 prior proceeding.” *Id.* (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)). Claim  
6 preclusion applies where the prior adjudication (1) involves the same claim as the later  
7 suit, (2) has reached a final judgment on the merits, and (3) involves the same parties or  
8 their privies. *United States v. Banco Intrenacional/Bital S.A.*, 110 F. Supp. 2d 1272, 1276  
9 (C.D. Cal. 2000).

10 Like issue preclusion, the first element of the claim preclusion inquiry involves  
11 consideration of four factors:

- 12 (1) whether rights or interests established in the prior judgment would be  
13 destroyed or impaired by prosecution of the second action;  
14 (2) whether substantially the same evidence is presented in the two actions;  
15 (3) whether the two suits involve infringement of the same right; and  
16 (4) whether the two suits arise out of the same transactional nucleus of  
17 facts.”

18 *Banco*, 110 F. Supp. 2d at 1276 (quoting *Costantini v. Trans World Airlines*, 681 F.2d  
19 1199, 1201–1202 (9th Cir.1982)). “These factors, however, are considered ‘tools of  
20 analysis, not requirements.” *Id.* (quoting *Int’l Union of Operating Eng’rs-Emp’rs Const.*  
21 *Indus. Pension, Welfare & Training Tr. Funds v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993)).  
22 The fourth factor is the most important. *Id.* (citing *Costantini*, 681 F.2d at 1202).

23 The fourth and most important factor weighs against preclusion. The essential facts  
24 that gave rise to the Coverage Action were the following: Switzer filed a cross-complaint  
25 against the Insureds that potentially gave rise to a defamation action for which Nautilus  
26 would owe a duty to defend. The facts that give rise to the Insureds remaining claims for  
27 promissory estoppel and violation of NRS § 686A.310 are different. The Insureds’  
28 promissory estoppel claim arises from a letter that Nautilus sent to the Insureds on  
November 7, 2016 (“November Letter”), stating that it “will continue to provide a defense  
to [the] Insureds in the [Switzer Action] until there is a decision on the Insureds’ motion for

1 reconsideration and appeal, if any[, in the Coverage Action].” (ECF No. 1-1 at 14.) The  
2 Insureds’ claim for violation of NRS § 686A.310 essentially arises from factual allegations  
3 that Nautilus failed to communicate promptly when the Insureds tendered defense of the  
4 Switzer Action. (*Id.* at 23-24.)

5 Two of the three remaining factors also weigh against preclusion. Regarding the  
6 first factor (whether this action would impair rights or interests established in the prior  
7 judgment), the Coverage Action established that Nautilus had a right to refrain from  
8 defending the Insureds. (ECF No. 13-1 at 12.) That right would not be impaired by a  
9 determination in this action that Nautilus violated NRS § 686A.310. Nor would that right  
10 be impaired by a determination that Nautilus was estopped from withdrawing its defense  
11 based on the November Letter. Nautilus’s right to refrain from defending the Insureds as  
12 established in the Coverage Action is based solely on the terms of the insurance policy  
13 and Insureds’ factual allegations relating to Switzer’s cross-complaint and the Weide E-  
14 mail. (ECF No. 13-4 at 4.) Nautilus may still have a right to refrain from defending on that  
15 basis, but Nautilus could simultaneously have assumed an obligation to defend on a  
16 different basis, e.g., promissory estoppel.

17 Regarding the third factor (whether the two suits involve infringement of the same  
18 right), the rights at issue in the two actions are different. In the Coverage Action, the right  
19 at issue was Nautilus’s right to refrain from defending the Insureds in the Switzer Action  
20 based on the terms of the insurance policy as applied to the factual allegations before the  
21 Court. (*Id.*) The right at issue in the Insureds’ claim for violation of NRS § 686A.310 is  
22 qualitatively different—at issue is the right to be free from unfair claims settlement  
23 practices. The right at issue in the Insureds’ claim for promissory estoppel is also  
24 different—at issue is the right to a defense based on promissory estoppel, not a right to a  
25 defense based on the terms of the insurance contract as applied to the Insureds’ factual  
26 allegations.

27 While the Insureds present substantially the same evidence in this action as in the  
28 Coverage Action (as discussed *supra*), the factors taken as a whole weigh against a

1 finding of preclusion. Accordingly, the Court finds that the Insureds' claims for promissory  
2 estoppel and violation of NRS § 686A.310 are not barred by claim preclusion.

### 3                   **3.       Failure to State a Claim**

#### 4                   **a.       Promissory Estoppel**

5           To state a claim for promissory estoppel under Nevada law, the Insureds must show  
6 four elements exist: "(1) the party to be estopped must be apprised of the true facts; (2)  
7 he must intend that his conduct shall be acted upon, or must so act that that party asserting  
8 estoppel has the right to believe it was so intended; (3) the party asserting the estoppel  
9 must be ignorant of the true state of facts; (4) he must have relied to his detriment on the  
10 conduct of the party to be estopped." *Pink v. Busch*, 691 P.2d 456, 459 (Nev. 1984).

11           Nautilus first argues that estoppel cannot be used to create coverage under an  
12 insurance policy where such coverage did not originally exist. (ECF No. 8 at 17.) While  
13 coverage did not exist based on the Court's ruling in the Coverage Action, Nautilus  
14 nevertheless agreed to defend the Insureds in the Switzer Action "until there is a decision  
15 on the Insureds' motion for reconsideration [of the initial order in the Coverage Action] and  
16 appeal, if any." (ECF No. 1-1 at 14.) Nautilus allegedly made this representation after this  
17 Court had already determined that Nautilus did not owe a duty to defend.<sup>7</sup> While Nautilus  
18 apparently could have withdrawn under its reservation of rights at that point, Nautilus  
19 instead agreed to defend the Insureds in the Switzer Action through appeal of the  
20 Coverage Action to the Ninth Circuit.

21           Nautilus next argues that the Insureds fail to explain how they relied on Nautilus's  
22 purported promise to their detriment. (ECF No. 8 at 19.) The Insureds counter that they  
23 sufficiently alleged detrimental reliance by alleging that they asked Nautilus "to reconsider  
24 its position based on the fact that the Insureds relied on Nautilus's previous  
25 representations and that trial in the Underlying Action was scheduled to begin in less than

26    ///

---

27           <sup>7</sup>In the Coverage Action, the Court issued its order on September 27, 2016 (ECF  
28 No. 13-1 at 1), and Nautilus made this representation on November 7, 2016 (ECF No. 1-  
1 at 14).

1 a month.” (ECF No. 20 at 17-18 (citing ECF No. 1-1 at 15).) This allegation does not state  
2 *how* the Insureds relied to their detriment, but the Court can reasonably infer that the  
3 Insureds suffered a detriment when they lost their counsel on the verge of trial (and prior  
4 to conclusion of their appeal of the Coverage Action judgment). This detriment resulted  
5 from their reliance on Nautilus’s representation that it would defend through appeal of the  
6 Coverage Action—if the Insureds were aware that they might lose their counsel prior to  
7 the conclusion of the Coverage Action appeal, they might have taken measures to mitigate  
8 the effects of Nautilus’s withdrawal.

9 The parties do not appear to dispute that the Insureds have adequately pleaded  
10 facts to support the first three elements of promissory estoppel. Accordingly, the Insureds  
11 have stated a claim for promissory estoppel.

12 **b. NRS § 686A.310**

13 The Insureds advance a number of claims for violation of NRS § 686A.310, but the  
14 Insureds have failed to plead factual allegations sufficient make any of these claims  
15 plausible.

16 First, the Insureds allege violation of NRS § 686A.310(1)(a), which prohibits  
17 “[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions  
18 relating to any coverage at issue.” The Insureds argue that Nautilus violated this provision  
19 by misrepresenting that it did not have a duty to defend even when the Insureds presented  
20 two new factual allegations in their second tender<sup>8</sup>—the statements by the Switzers during  
21 their depositions. (ECF No. 20 at 18.) This argument fails because Nautilus had a strong  
22 basis for representing that it did not have a duty to defend as the Court had already  
23 rendered judgment in the Coverage Action.<sup>9</sup> While the Court’s decision did not take into  
24

---

25 <sup>8</sup>The Insureds tendered defense of the Switzer Action for the first time on November  
26 14, 2013. (ECF No. 1-1 at 11.) After receiving notice that Nautilus planned to withdraw  
representation in the Switzer Action, the Insureds tendered defense a second time on July  
28, 2017 based on additional facts discovered in deposition testimony. (*Id.* at 15-16.)

27 <sup>9</sup>The Court’s decision in the Coverage Action issued on September 27, 2016 (ECF  
28 No. 13-1 at 12), and the Insureds submitted their second tender to Nautilus on July 28,  
2017 (ECF No. 1-1 at 16).

1 account the two additional factual allegations that the Insureds raised in their second  
2 tender, it would have been reasonable for Nautilus to evaluate the Insureds' new facts in  
3 light of that decision's reasoning and conclude that it still did not owe a duty to defend.  
4 The reasonableness of Nautilus's determination is borne out by the Court's subsequent  
5 decisions. In considering the Insureds' new facts on a motion for relief from judgment, the  
6 Court concluded that the allegations "probably did not trigger Nautilus's coverage." (ECF  
7 No. 13-4 at 4-5.)

8 The Insureds also argue that Nautilus violated this provision by misrepresenting  
9 that the Insureds were required to pay part of the costs of independent counsel. (ECF No.  
10 20 at 18.) This argument fails because the Insureds have alleged no basis for asserting  
11 that Nautilus was required to pay in full for independent counsel. The Insureds do not cite  
12 to any source of such legal obligation, whether statutory, contractual, or otherwise. (*Id.* at  
13 18; *see also* ECF No. 1-1 at 12-13.)

14 Next, the Insureds claim violation of NRS § 686A.310(1)(b), which prohibits "[f]ailing  
15 to acknowledge and act reasonably promptly upon communications with respect to claims  
16 arising under insurance policies." The Insureds argue that Nautilus violated this provision  
17 by failing to acknowledge the Insureds' first tender (made November 14, 2013) until  
18 December 6, 2013. (ECF No. 20 at 19; *see also* ECF No. 1-1 at 11-12.) The Insureds also  
19 argue that Nautilus violated this provision by failing to respond to their second tender  
20 (made July 28, 2017) until August 10, 2017. (ECF No. 20 at 19; ECF No. 1-1 at 15-16.)  
21 Nautilus responds that the Insureds' claims related to the first tender are time-barred under  
22 the three-year statute of limitations for actions based upon a liability created by NRS §  
23 11.190. (ECF No. 27 at 16.) The Court agrees that claims for violation of NRS § 686A.310  
24 related to the first tender are time-barred. Regarding the second tender, Nautilus cites to  
25 persuasive authority that a three-month delay in processing an insurance claim is not an  
26 unreasonable delay that constitutes a violation of NRS § 686A.310. *Williams v. Am.*  
27 *Family, Mut. Ins. Co.*, 593 Fed App'x 610, 612 (9th Cir. 2014); *see also Zurich Am. Ins.*  
28 *Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1238 (D. Nev. 2010) (finding that a

1 delay of just over two months could not support a claim under NRS § 686A.310(d)). The  
2 delay of less than half a month between the second tender and Nautilus's response is far  
3 less than three months. Thus, the Insureds have failed to plead that Nautilus did not  
4 provide a coverage decision within a reasonable period of time.

5 The Insureds further claim violation of NRS § 686A.310(1)(c), which prohibits  
6 "[f]ailing to adopt and implement reasonable standards for the prompt investigation and  
7 processing of claims arising under insurance policies." The Insureds argue that Nautilus's  
8 failure to adopt reasonable standards can be inferred from the delays between their  
9 tenders and Nautilus's responses. (See ECF No. 20 at 19.) The Court disagrees. The  
10 delay between the second tender and Nautilus's decision was thirteen days, a fairly short  
11 period of time. While the delay between the first tender and Nautilus's decision was  
12 significantly longer—four months—the Court infers that Nautilus's decision-making  
13 process took a long time because the issue was complicated. The very existence of the  
14 Coverage Action bolsters this inference. Accordingly, the Insureds have failed to plead  
15 facts that give rise to a plausible inference that Nautilus failed to adopt and implement  
16 reasonable standards.

17 The Insureds further claim violation of NRS §§ 686A.310(1)(d) and (e), which  
18 prohibit "[f]ailing to affirm or deny coverage of claims within a reasonable time after proof  
19 of loss requirements have been completed and submitted by the insured" and "[f]ailing to  
20 effectuate prompt, fair and equitable settlements of claims in which liability of the insurer  
21 has become reasonably clear." The Insureds argue that Defendant violated these  
22 provisions based on the same factual allegations used to support their claim for violation  
23 of subsection (c). (ECF No. 20 at 19.) The Court will dismiss these claims for the same  
24 reason stated in discussion of subsection (c).

25 The Insureds further claim violation of NRS § 686A.310(1)(f), which prohibits  
26 "[c]ompelling insureds to institute litigation to recover amounts due under an insurance  
27 policy by offering substantially less than the amounts ultimately recovered in actions  
28 brought by such insureds, when the insureds have made claims for amounts reasonably



1 similar to the amounts ultimately recovered.” The Insureds fail to allege any facts that they  
2 made claims for amounts similar to the amounts ultimately recovered. (See ECF No. 1-1  
3 at 23; ECF No. 20 at 19-20.) Accordingly, the Court will dismiss this claim.

4 Finally, the Insureds claim violation of NRS § 686A.310(n), which prohibits “[f]ailing  
5 to provide promptly to an insured a reasonable explanation of the basis in the insurance  
6 policy, with respect to the facts of the insured's claim and the applicable law, for the denial  
7 of the claim or for an offer to settle or compromise the claim.” The Insureds fail to describe  
8 how the explanation for denial of its claim was unreasonable, particularly given the Court’s  
9 determination that Nautilus did not owe a duty to defend. (See ECF No. 1-1 at 23; ECF  
10 No. 20 at 19-20.) Accordingly, the Court will dismiss this claim.

#### 11 **V. MOTION TO STRIKE (ECF No. 11)**

12 In light of the Court’s ruling on Nautilus’s motion to dismiss, it is unclear whether  
13 Nautilus still seeks to strike portions of the Insureds’ Complaint. Regardless, some of the  
14 requests in the motion are rendered moot by the Court’s rulings. (See, e.g., ECF No. 11  
15 at 14 (requesting that certain allegations in the breach of contract cause of action be  
16 struck).) Accordingly, the motion to strike is denied as moot.

#### 17 **VI. AMENDMENT**

18 The Court grants leave to amend with respect to the Insureds’ claims for violations  
19 of subsections (a), (c), (e), and (f) of NRS § 686A.310 because it is conceivable that the  
20 Insureds could amend their Complaint to cure the deficiencies that have resulted in  
21 dismissal of these claims. See *Contreras v. Toyota Motor Sales U.S.A. Inc.*, 484 F. App’x  
22 116, 118 (9th Cir. 2012) (“Courts ‘should freely give leave’ to amend ‘when justice so  
23 requires.’” (quoting Fed. R. Civ. P. 15(a)(2)); *Krainski v. Nev. ex rel. Bd. of Regents of*  
24 *Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010) (“Dismissal without leave to  
25 amend is improper unless it is clear . . . that the complaint could not be saved by any  
26 amendment.”).

27 The Court does not grant leave to amend claims under subsections (b) and (d)  
28 because the Insureds’ claims relating to the first tender are time-barred, and Nautilus

1 responded fairly quickly to the Insureds' second tender. The Court does not grant leave to  
2 amend a claim under subsection (n) because Nautilus's determination that it did not owe  
3 a duty to defend could not have been unreasonable in light of the Court's decision in the  
4 Coverage Action.

5 **VII. CONCLUSION**

6 The Court notes that the parties made several arguments and cited to several cases  
7 not discussed above. The Court has reviewed these arguments and cases and determines  
8 that they do not warrant discussion as they do not affect the outcome of the motions before  
9 the Court.

10 It is therefore ordered that Insureds' motion to remand (ECF No. 18) is denied.

11 It is further ordered that Nautilus's motion to dismiss (ECF No. 8) is granted in part  
12 and denied in part. It is granted as to the Insureds' claims for declaratory relief, breach of  
13 contract, breach of implied covenants, and violations of NRS § 686A.310. It is denied as  
14 to the Insureds' claim for promissory estoppel, which the Court permits to proceed. The  
15 Insureds will be given leave to file an amended complaint to cure the deficiencies with  
16 respect to its claims for violations of subsections (a), (c), (e), and (f) of NRS § 686A.310  
17 within ten (10) days. Failure to file an amended complaint will result in dismissal of these  
18 claims with prejudice and the case will proceed on the Insureds' claim for promissory  
19 estoppel.

20 It is further ordered that Nautilus's motion to strike (ECF No. 11) is denied as moot.

21 DATED THIS 26<sup>th</sup> day of December 2017.

22  
23   
24 \_\_\_\_\_  
25 MIRANDA M. DU  
26 UNITED STATES DISTRICT JUDGE  
27  
28